

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

LEVITON MANUFACTURING CO., INC.,

Plaintiff,

vs.

No. CIV 04-424 JB/LFG

NICOR, INC., d/b/a NICOR LIGHTING & FANS,

Defendant,

-- and --

ZHEJIANG DONGZHENG ELECTRICAL CO., LTD.,

Defendant/Intervenor.

Consolidated with:

LEVITON MANUFACTURING CO., INC.,

-- and --

Plaintiff,

vs.

No. CIV 04-1295 JB/LFG

HARBOR FREIGHT TOOLS U.S.A., INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Leviton Manufacturing Co., Inc.'s Expedited Motion for Change of Hearing Date, filed February 22, 2007 (Doc. 300)("Motion"). The Court held a hearing on the motion on February 23, 2007. The primary issue is whether the Court should vacate the hearing set for February 27, 2007 on the Defendants' Motion for Partial Summary Judgment of Non-Infringement of Claim 3 of U.S. Pat. No. 6,246,558, filed June 15, 2006 (Doc. 232)("Partial

Summary Judgment Motion”), because the attorney that Plaintiff Leviton Manufacturing Co., Inc. wants to argue the motion has suffered recent health problems. Because the Court concludes that Leviton has shown good cause to vacate the hearing, and because the Court will try to accommodate the Defendants’ concern by giving the parties a backup setting on its trailing docket for the week of March 12, 2007, the Court will grant Leviton’s motion and vacate the February 27, 2007 hearing.

PROCEDURAL BACKGROUND

This case is in its third year. See Complaint for Patent Infringement, April 16, 2004 (Doc. 1). The Defendants filed their Motion for Partial Summary Judgment before it was due under the Scheduling Order. See Partial Summary Judgment Motion; Initial Pre-trial Report, filed December 16, 2004 (Doc. 74)(setting deadline of September 6, 2006). Briefing on the Defendants’ Motion for Partial Summary Judgment was completed on October 11, 2006. See Doc. 232; Leviton Manufacturing Company, Inc.’s Opposition to Defendants’ Partial Motion for Summary Judgement of Non-infringement of Claim 3 of U.S. Pat. No. 6,246,558, filed September 26, 2006 (Doc. 252); Reply Memorandum of Points and Authorities in Further Support of Defendants’ Motion for Summary Judgment of Non-infringement of Claim 3 of U.S. Pat. No. 6,246,558, filed October 11, 2006 (Doc. 260). The Defendants did not file a Notice of Completion after filing their reply, see D.N.M.LR-Civ. 7.3 (“[U]pon the completion of briefing, the movant must file and serve on each party a Notice of Completion of Briefing”), and the Court was not aware that briefing was complete until the Markman hearing in the 05–CV–301 case on January 8, 2007, see Hearing Transcript at 114:6-25 (Court)(taken January 8, 2007). Following that Markman hearing, the parties worked through a number of possible dates, overcoming many scheduling difficulties and finally settling on the current date of February 27, 2007, for the hearing on the Defendants’ partial summary judgment

motion.

The Court set the hearing on the Defendants' motion for Tuesday, February 27, 2007. See Notice of Hearing, filed January 18, 2007 (Doc. 298). Paul Sutton of the Greenberg Traurig, LLP firm represents that Leviton has asked him to present its argument at the hearing. See Motion at 2. Mr. Sutton submits that he has represented Leviton for more than 35 years. See id.

Mr. Sutton represents that he underwent surgery for melanoma the week of February 12, 2007. See id. The week of February 19, 2007, Mr. Sutton asserts, he developed an infection related to the surgery. See id. Mr. Sutton submits that, as a result, he is still under medication and experiencing a great deal of pain, which will interfere with his ability to properly and fully prepare for and present Leviton's argument on February 27, 2007. See id.

Leviton represents that it approached the Defendants to request a two-week postponement subject to the Court's availability. See id. Leviton asserts that, before indicating whether they would agree, the Defendants asked counsel for Leviton to contact the Court for available dates. See id. Leviton maintains that the Court's relief courtroom deputy, Juan Gonzales, informed counsel for Leviton that April 10 and 12, 2007, were the earliest available dates. See id.

Leviton submits that, when Leviton informed the Defendants of the Court's available dates, the Defendants requested further information regarding Mr. Sutton's medical condition, which Leviton provided. See Motion, Exhibit A, E-mail from Alberto Leon to Emil Kiehne (dated February 22, 2007); Motion, Exhibit A, E-mail from Emil Kiehne to Alberto Leon (dated February 22, 2007). Nevertheless, Leviton represents that the Defendants' counsel indicated that, while a two-week extension might be agreeable, they will not agree to a postponement of the hearing to either April 10 or April 12, 2007, despite Mr. Sutton's status. See id. Accordingly, Leviton requests that the Court

postpone the hearing date of February 27, 2007, to the earliest available court date. See id. Leviton requests that the Court reschedule the hearing on the Defendants' Motion for Partial Summary Judgment. See id. at 1-2.

The Defendants have indicated that they oppose this motion. See id. at 2. As a matter of professional courtesy, all counsel for the Defendants would have been willing to extend the hearing date by two weeks. See Response in Opposition to Plaintiff's Expedited Motion for Change of Hearing Date at 2, filed February 23, 2007 (Doc. 302)("Response"). Leviton states that, because of Mr. Sutton's condition, and because the hearing date is so close at hand, it is left with no choice but to request that a telephonic hearing be scheduled for February 23, 2007. Since Mr. Gonzales spoke with Leviton's counsel, the Court has scheduled a trip to Las Cruces, New Mexico on April 10, 2007 to handle criminal matters and is no longer available to hear the Partial Summary Judgment Motion on that date.

ANALYSIS

This situation is unfortunate. Mr. Sutton's health problems were not expected and could not have been avoided. The Court and the Defendants understand Mr. Sutton's and his client's situation, and the Defendants state that they would hope, if the circumstances were reversed, that the Plaintiffs would be equally understanding. See id. at 2. Because a continuation from Tuesday, February 27, 2007, however, entails a delay of at least seven weeks to April 10 or 12, 2007, the Defendants' clients oppose the Expedited Motion for Change of Hearing Date. See id. The Court understands that the Defendants are eager to get their motion for partial summary judgment decided. The Defendants represent that every day that the case is pending causes them substantial economic harm. See id. The Defendants assert that, as evidenced by the early filing of their motion for summary judgment, they

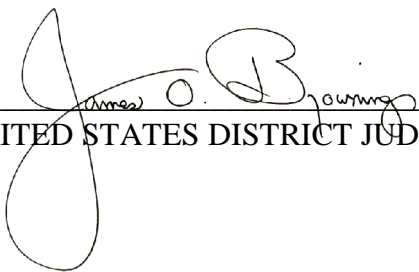
desire to have this matter resolved as quickly as possible to remove the shadow of this litigation from their businesses. See id.

The Court is eager to decide the motion as well. Because of extensions of time, the Court was not aware that the Defendants had filed their reply, and the motion has been pending without a hearing longer than the Court prefers for such motions. The motion has been pending since June 15, 2006, and will appear on the Court's six-month list next month if the Court does not dispose of it by the end of the month. See Doc. 232.

Nevertheless, the Court cannot say that the passage of one more month will make a material difference in the resolution of this case. The Court handed down its claim construction decision on May 23, 2006. See Memorandum Opinion and Order, filed May 23, 2006 (Doc. 230). The parties took approximately four months to brief the motion for summary judgment. See Doc. 232; Doc. 252; Doc. 260. Also, the harm to the Defendants resulting from any delay is unclear, because Leviton has another patent infringement case against them involving a similar patent; thus any shadow for Leviton's claims will not be completely lifted even if the Court grants their motion. Based upon the timing pattern of the case so far, the Court believes that it is best to honor Leviton's request and reset the hearing.

The Court will set the hearing for the afternoon of April 12, 2007. The Court has a trailing docket set for the week of March 12, 2007 and, at the present, believes that it may have two trials that week. Nevertheless, in an effort to expedite consideration of this matter, the Court will also set a hearing on March 15, 2007, as a backup setting. As the parties get closer to that date and need to make arrangements, they may call Mr. Gonzales, and he will inform the parties of the status of the Court's trailing docket.

IT IS ORDERED that Leviton Manufacturing Inc., Co.'s Expedited Motion for Change of Hearing Date is granted. The hearing set for February 27, 2007 is vacated. The Court sets a hearing on the Defendants' motion for partial summary judgment for April 12, 2007, and a backup setting on March 15, 2007. As the parties get closer to the date of March 15, 2007, they should call the Court's courtroom deputy clerk on this case, Juan Gonzales, and he will advise the parties of the status of the Court's trailing docket that week.



UNITED STATES DISTRICT JUDGE

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